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2
3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT TACOMA

6 HOUDINI GRAHAM,

7 Plaintiff,

8 v.

9 CAROLYN W. COLVIN, Acting
10 Commissioner of Social Security,

11 Defendant.

Case No. 3:15-cv-05048-KLS

ORDER AFFIRMING DEFENDANT'S
DECISION TO DENY BENEFITS

12
13 Plaintiff has brought this matter for judicial review of defendant's denial of his
14 applications for disability insurance and supplemental security income ("SSI") benefits. Pursuant
15 to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73 and Local Rule MJR 13, the parties
16 have consented to have this matter heard by the undersigned Magistrate Judge. After reviewing
17 the parties' briefs and the remaining record, the Court hereby finds that for the reasons set forth
18 below, defendant's decision to deny benefits should be affirmed.

20 FACTUAL AND PROCEDURAL HISTORY

21 On November 18, 2009, plaintiff filed an application for disability insurance benefits and
22 another one for SSI benefits, alleging in both applications he became disabled beginning
23 November 19, 2009. *See* Dkt. 13, Administrative Record ("AR") 15D. Both applications were
24 denied upon initial administrative review on July 29, 2010 and on reconsideration on February
25 13, 2011. *See id.* A hearing was held before an administrative law judge ("ALJ") on January 31,

26
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1 2013, at which plaintiff, represented by counsel, appeared and testified, as did two lay witnesses
2 and a vocational expert. *See AR 660-820.*

3 In a decision dated July 15, 2013, the ALJ determined plaintiff to be not disabled. *See AR*
4 15D-15Z. Plaintiff's request for review of the ALJ's decision was denied by the Appeals Council
5 on November 21, 2014, making that decision the final decision of the Commissioner of Social
6 Security (the "Commissioner"). *See AR 7; 20 C.F.R. § 404.981, § 416.1481.* On January 23,
7 2015, plaintiff filed a complaint in this Court seeking judicial review of the Commissioner's final
8 decision. *See Dkt. 3.* The administrative record was filed with the Court on April 10, 2015. *See*
9 Dkt. 13. The parties have completed their briefing, and thus this matter is now ripe for the
10 Court's review.

12 Plaintiff argues defendant's decision to deny benefits should be reversed and remanded
13 for further administrative proceedings because the ALJ erred: (1) in failing to follow the proper
14 evaluation technique in finding plaintiff did not have a severe mental impairment; and (2) in
15 failing to comply with the Commissioner's rulings in finding plaintiff to be non-compliant with
16 recommended treatment. Plaintiff further argues that in light of these errors, the ALJ's residual
17 functional capacity ("RFC") assessment and the hypothetical question he posed to the vocational
18 expert at the hearing are unsupported by substantial evidence. For the reasons set forth below,
19 however, the Court disagrees that the ALJ erred as alleged, and therefore finds that defendant's
20 decision to deny benefits should be affirmed.

22 DISCUSSION

24 The determination of the Commissioner that a claimant is not disabled must be upheld by
25 the Court, if the "proper legal standards" have been applied by the Commissioner, and the
26 "substantial evidence in the record as a whole supports" that determination. *Hoffman v. Heckler,*

1 785 F.2d 1423, 1425 (9th Cir. 1986); *see also Batson v. Commissioner of Social Security Admin.*,
 2 359 F.3d 1190, 1193 (9th Cir. 2004); *Carr v. Sullivan*, 772 F.Supp. 522, 525 (E.D. Wash. 1991)
 3 (“A decision supported by substantial evidence will, nevertheless, be set aside if the proper legal
 4 standards were not applied in weighing the evidence and making the decision.”) (citing *Brawner*
 5 *v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1987)).
 6

7 Substantial evidence is “such relevant evidence as a reasonable mind might accept as
 8 adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citation
 9 omitted); *see also Batson*, 359 F.3d at 1193 (“[T]he Commissioner’s findings are upheld if
 10 supported by inferences reasonably drawn from the record.”). “The substantial evidence test
 11 requires that the reviewing court determine” whether the Commissioner’s decision is “supported
 12 by more than a scintilla of evidence, although less than a preponderance of the evidence is
 13 required.” *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). “If the evidence
 14 admits of more than one rational interpretation,” the Commissioner’s decision must be upheld.
 15 *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984) (“Where there is conflicting evidence
 16 sufficient to support either outcome, we must affirm the decision actually made.”) (quoting
 17 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971)).¹

19 I. The ALJ’s Determination of Non-Severity

20 Defendant employs a five-step “sequential evaluation process” to determine whether a

22 ¹ As the Ninth Circuit has further explained:

23 . . . It is immaterial that the evidence in a case would permit a different conclusion than that
 24 which the [Commissioner] reached. If the [Commissioner]’s findings are supported by
 25 substantial evidence, the courts are required to accept them. It is the function of the
 26 [Commissioner], and not the court’s to resolve conflicts in the evidence. While the court may
 not try the case de novo, neither may it abdicate its traditional function of review. It must
 scrutinize the record as a whole to determine whether the [Commissioner]’s conclusions are
 rational. If they are . . . they must be upheld.

Sorenson, 514 F.2dat 1119 n.10.

1 claimant is disabled. *See* 20 C.F.R. § 404.1520; 20 C.F.R. § 416.920. If the claimant is found
 2 disabled or not disabled at any particular step thereof, the disability determination is made at that
 3 step, and the sequential evaluation process ends. *See id.* At step two of the evaluation process,
 4 the ALJ must determine if an impairment is “severe.” 20 C.F.R. § 404.1520, § 416.920. An
 5 impairment is “not severe” if it does not “significantly limit” a claimant’s mental or physical
 6 abilities to do basic work activities. 20 C.F.R. § 404.1520(a)(4)(iii), (c), § 416.920(a)(4)(iii), (c);
 7 *see also* Social Security Ruling (“SSR”) 96-3p, 1996 WL 374181 *1. Basic work activities are
 8 those “abilities and aptitudes necessary to do most jobs.” 20 C.F.R. § 404.1521(b), § 416.921(b);
 9 SSR 85- 28, 1985 WL 56856 *3.
 10

11 An impairment is not severe only if the evidence establishes a slight abnormality that has
 12 “no more than a minimal effect on an individual[’]s ability to work.” SSR 85-28, 1985 WL
 13 56856 *3; *see also Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996); *Yuckert v. Bowen*, 841
 14 F.2d 303, 306 (9th Cir.1988). Plaintiff has the burden of proving that his “impairments or their
 15 symptoms affect [his] ability to perform basic work activities.” *Edlund v. Massanari*, 253 F.3d
 16 1152, 1159-60 (9th Cir. 2001); *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1998). The step two
 17 inquiry described above, however, is a *de minimis* screening device used to dispose of groundless
 18 claims. *See Smolen*, 80 F.3d at 1290.
 19

20 The ALJ in this case found that while there were allegations of mental impairments, the
 21 objective evidence in the record did not support the existence of a medically determinable mental
 22 impairment. *See* AR 15P-15Q. Plaintiff argues that in so finding the ALJ erred by not following
 23 the proper prescribed technique for making that determination. The Court disagrees.
 24

25 To evaluate the severity of a claimant’s mental impairments at step two of the sequential
 26 disability evaluation process, the Commissioner must “follow a special technique at each level in

1 the administrative review process,” including “[a]t the administrative law judge hearing” level.
 2 20 C.F.R. § 404.1520a(a), (e) § 416.920a(a), (e). Under this technique, the Commissioner first
 3 determines whether the claimant has a medically determinable impairment. *See* 20 C.F.R. §
 4 404.1520a(b)(1), § 416.920a(b)(1). If the claimant does have a medically determinable
 5 impairment, then the Commissioner must rate the “degree of functional limitation” resulting
 6 therefrom.² 20 C.F.R. § 404.1520a(b), § 416.920a(b).

7 At the initial and reconsideration levels of the administrative review process, “a standard
 8 document” is completed to record how the above special technique was applied. 20 C.F.R. §
 9 404.1520a(e), § 416.920a(e). At the ALJ hearing level, documentation of the technique is done
 10 in the decision itself. *Id.* As plaintiff points out, the ALJ did not expressly document this
 11 technique in his decision even though, as noted above, he was required to do so. *See* AR 15N-
 12 15Q; *Keyser v. Commissioner Social Security Admin.*, 648 F.3d 721, 726 (9th Cir. 2011) (finding
 13 ALJ erred in part due to failure to document application of technique). Failure to document the
 14 technique by the ALJ, however, “does not require reversal in situations where there is no viable
 15 claim of mental impairment.” *Gutierrez v. Apfel*, 199 F.3d 1048, 1051 (9th Cir. 2000) (pointing
 16 out that documentation of special technique “would not necessarily be material to a disability
 17 claim based, for example, predominately on a shoulder injury, even if a claimant alleged a minor
 18 nonexertional impairment such as controllable alcohol abuse”).

21 Documentation of the special technique, accordingly, is required only “where there is a
 22 colorable claim of mental impairment.” *Gutierrez*, 199 F.3d at 1051; *see also Keyser*, 648 F.3d at
 23

25 ² Rating the degree of functional limitation involves consideration of four functional areas: activities of daily living;
 26 social functioning; concentration, persistence or pace; and episodes of decompensation. *See* 20 C.F.R. §
 24 404.1520a(c), § 416.920a(c). If a claimant’s degree of limitation in the first three areas is rated “none” or “mild” and
 25 “none” in the fourth area, then the claimant’s mental impairment generally is considered not severe, unless evidence
 26 in the record otherwise indicates there is more than a minimal limitation in the claimant’s ability to do basic work
 24 activities. 20 C.F.R. § 404.1520a(d)(1), § 404.1520a(d)(1).

1 726 (ALJ's failure to comply with 20 C.F.R. § 404.1520a not harmless if claimant has colorable
2 claim of mental impairment). Where a claimant fails to establish the existence of a medically
3 determinable impairment, he or she also necessarily fails to establish a colorable claim of mental
4 impairment. *See Coleman v. Colvin*, 524 F. Appx. 325, 326 (9th Cir. 2013).

5 A medically determinable mental impairment "must result from . . . psychological
6 abnormalities which can be shown by medically acceptable clinical and laboratory diagnostic
7 techniques," and "must be established by medical evidence consisting of signs, symptoms, and
8 laboratory findings, not only by [the claimant's] statement of symptoms." 20 C.F.R. § 404.1508,
9 § 416.908; *see also* 20 C.F.R. § 404.1527a(b)(1), § 416.927a(b)(1); *Coleman*, 524 F. App'x at
10 326 (upholding determination of ALJ that claimant failed to establish medically determinable
11 mental impairment, because she "failed to present any evidence of signs or laboratory findings
12 establishing that [she] suffered from a mental impairment").

14 Plaintiff argues he has presented a colorable claim of mental impairment requiring the
15 ALJ to apply the special technique, because that claim is not "wholly insubstantial, immaterial,
16 or frivolous." Dkt. 17, p. 6 (citing *Cassim v. Bowen*, 824 F.2d 791, 795 (9th Cir. 1987) (finding
17 plaintiff's due process claim to be colorable as it raised "a serious constitutional challenge" and
18 was "not insubstantial, immaterial, or frivolous")). Specifically, plaintiff points to the evaluation
19 report of Cassandra Clark, Ph.D., who found him to have moderate to severe limitations in
20 several areas of social functioning based on a number of mental health diagnoses (*see* AR 524-
21 25), as well as that of Robert Parker, Ph.D., who also found plaintiff to be moderately to severely
22 limited in terms of both cognitive and social functioning similarly based on a number of mental
23 health diagnoses (*see* AR 432-33).

26 The ALJ found that with the exception of the diagnosis of malingering Dr. Clark offered,

1 there was no objective medical basis for the other diagnoses Dr. Clark and Dr. Parker made, but
 2 instead they were based on plaintiff's self-reported symptoms and subjective complaints, which
 3 the ALJ found lacked credibility. *See AR 15P-15Q.* An ALJ may reject a medical source's
 4 opinion "if it is based 'to a large extent' on a claimant's self-reports that have been properly
 5 discounted as incredible." *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (quoting
 6 *Morgan*, 169 F.3d 595, 602 (9th Cir.1999)). Plaintiff does not argue the ALJ erred in finding he
 7 lacked credibility overall concerning those symptoms and complaints, but rather asserts the ALJ
 8 erred in finding Dr. Clark and Dr. Parker over-relied on his self-reporting.

10 It is true that "an ALJ does not provide clear and convincing reasons for rejecting an
 11 examining physician's opinion by questioning the credibility of the [claimant's] complaints
 12 where the [physician] does not discredit those complaints and supports his ultimate opinion with
 13 his own observations." *Ryan v. Commissioner of Social Security*, 528 F.3d 1194 (9th Cir. 2008).
 14 Except for the observation that plaintiff had pressured speech, though, all of the other findings
 15 Dr. Clark reported either clearly were based on plaintiff's self-reporting or were susceptible to
 16 being manipulated by him. *See AR 523-30; Ukolov v. Barnhart*, 420 F.3d 1002, 1006 (9th Cir.
 17 2005) (stating that portions of physician's records where claimant's subjective complaints were
 18 noted "do not support a finding of impairment because they are based solely on [his] own
 19 'perception or description' of his problems," and that positive Romberg test did not sufficiently
 20 bolster that claimant's claimed impairment because it was "susceptible to subject manipulation,"
 21 as he could "control the extent of his unsteadiness"). The same is true with respect to the clinical
 22 findings reported by Dr. Parker. *See AR 431-38.*

25 This determination is bolstered by the clear evidence of malingering Dr. Clark observed
 26 on the part of plaintiff. *See AR 525* (reporting that cognitive testing was "discontinued because

1 he was so blatantly malingering,” resulting in “[n]o cognitive ratings” being given). In addition,
 2 although Dr. Clark noted that plaintiff’s “lack of effort” occurred on the cognitive portion of the
 3 evaluation and specifically offered a diagnosis of malingering in regard thereto (AR 524, 526),
 4 she also expressly stated that such lack of effort on that portion of the evaluation “render[ed] the
 5 other areas [of the evaluation] suspect” as well (AR 526). This over reliance on plaintiff’s own
 6 discredited self-reporting thus distinguishes it from *Keyser* and *Gutierrez*, where there was no
 7 indication that the same credibility issues were present. *See* 648 F.3d at 723-26; 199 F.3d at
 8 1050-51.³ Accordingly, the ALJ did not err in finding plaintiff had no medically determinable
 9 mental impairment without first applying the special technique, as plaintiff has not established
 10 the existence of a colorable claim of mental impairment.

12 II. The ALJ’s Finding of Non-compliance

13 The ALJ discounted plaintiff’s credibility in part based on his failure to follow prescribed
 14 treatment for his uncontrolled hypertension. *See* AR 15S-15T. Failure to assert a good reason for
 15 not seeking, or following a prescribed course of, treatment “can cast doubt on the sincerity of the
 16 claimant’s pain testimony.” *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). Plaintiff argues
 17 the ALJ erred in so finding, because he did not comply with the requirements of Social Security
 18 Ruling (“SSR”) 82-59, which provides that particular care should be taken to look into the
 19 reasons why a claimant is noncompliant – including re-contacting the claimant’s treating sources
 20 – before making a finding of non-disability based on noncompliance. 1982 WL 31384, at *2-*3.
 21 But as pointed out by defendant, SSR 82-59 applies only where the claimant is first found to be
 22 disabled. *See* 1982 WL 31384, at *1 (“An individual who would otherwise be found to be under
 23 a disability, but who fails without justifiable cause to follow treatment prescribed by a treating

26 ³ The same is true with respect to the Ninth Circuit’s decision in *Angevine v. Colvin*, 542 Fed. Appx. 589 (9th Cir. 2013), cited in plaintiff’s reply brief.

1 source which . . . can be expected to restore the individual's ability to work, cannot by virtue of
2 such 'failure' be found to be under a disability.").

3 Plaintiff protests that such a reading of SSR 82-59 "sounds unduly technical." Dkt.21, p.
4 5. Be that as it may, this is what that ruling expressly provides. As such, the Court shall abide by
5 its provisions. *See Chavez v. Department of Health and Human Services*, 103 F.3d 849, 851 (9th
6 Cir. 1996) (noting that SSRs "constitute the Social Security Administration's interpretations of
7 the statute it administers and of its own regulations," and that although they "are interpretative
8 rulings and do not have the force of law," courts are to defer to them "unless they are plainly
9 erroneous or inconsistent with the [Social Security] Act or regulations."). Given that plaintiff has
10 not shown the requirements of SSR 82-59 are "plainly erroneous or inconsistent" with the Social
11 Security Act, he has offered no basis for declining to apply them in this case.⁴

12
13 CONCLUSION
14

15 Based on the foregoing discussion, the Court hereby finds the ALJ properly concluded
16 plaintiff was not disabled. Accordingly, defendant's decision to deny benefits is AFFIRMED.

17 DATED this 8th day of September, 2015.

18
19
20 
21 Karen L. Strombom
22 United States Magistrate Judge
23
24

25 ⁴ Plaintiff also appears to argue that the ALJ did not adequately take into consideration his claim of being unable to
26 afford his blood pressure medication as a reason for not complying with recommended treatment in discounting his
credibility. *See Gamble v. Chater*, 68 F.3d 319, 321 (9th Cir. 1995) (benefits may not be denied because of failure to
obtain treatment due to inability to afford it). Even if it can be said the ALJ erred in failing to do so, again as pointed
out by defendant, the ALJ also offered other reasons for discounting plaintiff's credibility, including the evidence of
malingering in the record, none of which plaintiff has challenged. *See AR 15L-15Q*.

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